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IN THE

Supreme Court of the United States

438

October Term 1969.

HAROLD L. SCRIVEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States,

October 1969 Term.

HAROLD L. SCRIVEN,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Harold L. Scriven, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-captioned case on June 2, 1970.

Citations to Opinion Below.

Incredibly, because there were serious questions of law presented, the court below rendered no opinion whatsoever, and affirmed the judgment of conviction summarily without oral argument. Appended hereto, and printed as Appendix A, is the order of affirmance of the court below.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 2, 1970. The jurisdiction of this court is invoked under Title 28, United States Code, §1254(1).

Enlargement of Time.

The statutory time within which to file the petition herein expired on July 2, 1970. Appended hereto, and printed herein as Appendix B, is an order of this court enlarging the time within which to file this petition to August 1, 1970.

Questions Presented.

(1) There was insufficient probable cause shown to sustain the petitioner's arrest because, viewed in a light most favorable to the Government, (a) the arrest was based upon mere suspicion and speculation, and (b) the arrest was made solely for the purpose of making a search of the petitioner's automobile.

(2) The warrantless search of the automobile and the resultant seizure of the contraband was illegal because (a) procuring a search warrant prior to search was essential inasmuch as the search which was made was not incidental to a lawful arrest and (b) the search of the car, which was seized by the Government, and remained continuously and permanently under the exclusive control and dominion of the Government, required a prior warrant under the clear holdings of this court.

(3) The *scienter* essential for a conviction was wholly lacking and unproved save by a tenuous inference based upon a tenuous inference; a concept fatally flawed under the law.

Statute Involved.

Title 21, United States Code, §174, provides:

§174. *Same: penalty: evidence.*—

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237[c] of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Rule Involved.

Federal Rules of Criminal Procedure, Rule 41(e):

Rule 41. *Search and seizure.*

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the

use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statement.

The petitioner was indicted in the Eastern District of New York in two counts, each for the violation of Title 21, United States Code, §174. He was tried by judge and jury and convicted on both counts after trial.

A motion to suppress the evidence, heroin, was timely and properly made by the petitioner. That motion was in all respects denied.

The Evidence.

The Government made the following case:

John O'Brien, an agent of the United States Bureau of Narcotics, testified that, shortly after noon on October 14, 1967, he observed the defendant, a black man,

driving a 1965 green Cadillac car on Astoria Boulevard, in Queens County, New York, within the territorial confines of the Eastern District of New York.

He had had one John Esposito and one Paul Esposito under "surveillance" in Queens County since about 8:00 A. M. on that day. They drove to a pizzeria on Astoria Boulevard, where they met the defendant on the sidewalk and spoke with him briefly. Then John Esposito and the defendant entered the pizzeria, and O'Brien followed them in. He then overheard what he said was "dribs and drabs" of the conversation. He heard John Esposito utter the words "stuff," "you can cut it six times," and "heard something about a gas station later that night." O'Brien then observed the defendant pass "a large quantity of money," "a pretty thick stack of bills" to John Esposito. O'Brien then left the store and followed the defendant to the defendant's home in the Bronx, New York.

Later that same day, just before 7:00 P. M., he followed the defendant back to Queens. On that occasion, the defendant had a passenger in his car by the name of Chris Heyward, another black man. O'Brien followed them to a parking lot of a "Carvel" ice cream store on 21st Avenue in Queens, where the defendant and Heyward both alighted from the car. They walked to the front of the Carvel store where they met John Esposito and his brother, Cooky Esposito (not to be confused with Paul Esposito). Then John Esposito and the defendant walked toward the defendant's car. This tableau was being observed by O'Brien through field glasses while he was seated in a Government car parked without lights in the street some distance away. Through these field glasses he saw John Esposito get behind the wheel of the defendant's car and the defendant walking around to the passenger side of the

front seat." While he testified "it appeared he [the defendant] was also getting in," he responded to the judge, as follows:

> "The Court: Whether he got all the way in or partially in or did not get in at all, you don't know?
>
> "The Witness: Yes, sir."

O'Brien then said that he saw John Esposito "reaching into his pocket" and saw him removing something therefrom. He "couldn't tell what it was." John had "closed the door" of the defendant's car, remained there but a few seconds, and then he got out of the car. John and the defendant then walked toward the ice cream stand, where they stood and talked "for a while."

It was only when pressed on cross examination that O'Brien conceded that Chris Heyward was a passenger in defendant's car that evening, and that, when the car arrived at the Carvel parking lot, Heyward got out, walked around and then reentered the car.

After John and the defendant talked, defendant and Heyward both boarded the defendant's car and the defendant drove off. O'Brien and his subordinate agents followed the car to 21st Avenue, Queens, a short distance from Carvel's, where O'Brien forced the defendant's car to the curb, alit from the Government's vehicle, told the defendant "he was under arrest," and ordered defendant out of the car, where and when the defendant was immediately frisked and handcuffed. Heyward was also ordered out of the car, frisked and handcuffed.

Then O'Brien looked under the "front seat" of the defendant's car and removed "a package wrapped in newspaper." Then all of the cars, those of the Government and that of the defendant, were driven around the cor-

ner, with the defendant and Heyward prisoners on the back seat of a Government car. There, O'Brien advised the defendant of his "constitutional rights." Then the defendant and his passenger were driven to the office of the United States Narcotics Bureau, on Church Street, in New York County, City of New York.

At the moment O'Brien arrested the defendant, he had no knowledge of the presence of any narcotics in the defendant's car, and the arrest of the defendant preceded the finding of the package wrapped in newspaper. He testified:

> "Q. Now, when you arrested Scriven, you knew, didn't you, that he had gotten narcotics from Esposito? A. I didn't know."

Once the defendant was arrested and removed from his car, he was never permitted near it again. The car was seized forthwith by the Government, and possession, exclusive dominion and control thereof was never relinquished by the Government.

Chris Heyward was immediately released, never indicted and never tried, although he had a history of federal narcotic convictions. The defendant, the petitioner here, had had no prior narcotics history of any kind. With respect to the Espositos, none of them were ever arrested, in connection with this case or otherwise, none of them were ever indicted, and surveillance of them was dropped forever.

The defense of the defendant was, in part:

He denied all knowledge of the narcotics and complicity in the crime charged, but petitioner hesitates to press this point in order that this petition be not cluttered with irrelevancies. But Chris Heyward did, on October 27, 1967, some thirteen days after the incident, come voluntarily and without invitation to the office of

petitioner's trial counsel where, under no compulsion whatever, without any urging, and made fully aware of the possible consequences, he made a full and complete written statement to petitioner's trial counsel, wherein he exculpated the petitioner entirely from any complicity in the crime charged and inculpating himself alone, stating that petitioner was innocently doing Heyward the favor of transporting him to the place of rendezvous.

Reasons For Granting The Writ.

The writ should be granted because:

(a) the Second Circuit has rendered a decision in direct conflict with the decisions of its own, in direct conflict with decisions of other circuits, and direct conflict with decisions of this court;

(b) the Second Circuit has decided federal questions in conflict with the applicable decisions of this court.

The Argument.

A. On the question of probable cause:

The proof demonstrated—and the truth of the matter is—that the petitioner had never before been concerned in any illegal activity involving narcotics in all the 44 years of his life. His only prior involvement with the law was in 1946, when, in his early twenties, he pleaded guilty to an attempted robbery and was sent to the New York State Elmira Reformatory to serve a one-to-five-year prison term. While there, he learned the trade of upholstering, which he has pursued continuously and gainfully from the date of his release from custody up to the present time. Like many disadvantaged people of the black race, relegated by so-

cial and economic pressures to ghetto and sub-standard housing, petitioner satisfied his yearning for human dignity and status by becoming the proud owner of that greatest of all American status symbols, a Cadillac automobile, concerning whose acquisition he said:

> "Buying a Cadillac is the most major thing I ever did in my life."

Viewing the testimony of the Government, in a light most favorable to the Government, only these bare facts were developed:

(a) At about noon on October 14th petitioner was heard in conversation with John Esposito wherein John mentioned "Stuff," "it can be cut six ways" and a rendezvous later that day at a gas station. The petitioner was observed passing "a large quantity of money" to John. Apropos that money O'Brien testified—and this was the operation of his own mind—"passing of money is no crime."

(b) Some time after 7:00 P. M., some seven hours later, the petitioner was observed, accompanied by Chris Heyward, parking his car in a Carvel store lot and alighting therefrom with Heyward. He walked to the front of the Carvel store, where he met John Esposito and engaged him in conversation. They were both observed walking toward petitioner's car, where John slid behind the wheel, shutting the door after him. O'Brien was not sure whether the petitioner boarded his own car on the passenger side or not. With a closed door intervening, O'Brien said he saw John "reaching into his pocket" and saw him remove something therefrom. He "couldn't tell what it was." John and petitioner departed the car, walked away, spoke briefly, and then pefitioner and Heyward boarded the car and drove away. At the moment O'Brien arrested petitioner, he admitted to having no knowledge that

petitioner had "gotten narcotics from Esposito." At no time was it claimed or even inferred that petitioner ever came into bodily contact with any package in the car, containing narcotics or otherwise.

This was the sum and substance of the Government's proof. The totality of the actions hereinabove described falls far short of the minimum standards fixed for probable cause to make a warrantless arrest. Each and every action of the petitioner, up to the moment of his arrest, accepting O'Brien's view that the passing of money per se is no crime, was as consistent with innocent conduct as it was with guilty conduct; in truth, it could be viewed as guilty conduct only by the torturing of reason and by the exercise of an acutely paranoid suspicion.

B. On the question of search and seizure:

Logically, if there was insufficient reasonable or probable cause to make an arrest, the arrest was unlawful, and the resultant search cannot be said to have been incidental to a lawful arrest.

The Government may be heard to argue that the arrest was lawful and that, consequently, the "contemporaneous" search of petitioner's motor vehicle was incidental to a lawful arrest. That argument is not tolerable. The case law, as laid down by this court and followed by other circuits, negates such a departure from minimum standards defining what constitutes a lawful arrest.

Assume, *arguendo*, that the arrest was indeed lawful. A warrantless search is in derogation of the Fourth Amendment to the United States Constitution, and the burden weighs heavily on the Government to demonstrate beyond dispute its right to sustain the validity

of a search made without a search warrant. Petitioner was arrested, forcibly ejected from his car, searched fruitlessly and manacled, and hustled into the back seat of the Government's car. Never again was the petitioner permitted access to his own car. From the very first moment, the Government seized possession of petitioner's motor vehicle and exercised exclusive, continuous, uninterrupted and unimpaired control and dominion thereover. In those circumstances, under the guidelines promulgated by this court, no so-called contemporaneous search was either indicated or necessary, and the Government could have at its leisure and convenience and should have applied for a search warrant as a pre-condition of making the search.

Moreover, from the lips of the Government's own witness came those words which make manifestly clear that the only reason for making the arrest was to conduct a search of the car. In such case, as this court has stated, the search is illegal and the arrest itself is unlawful.

C. On the question of the proof of possession as denoting *scienter* sufficient to justify or warrant a conviction:

The Government failed to make out a prima facie case of guilt, and the petitioner's motion, made at the close of the Government's case and renewed at the end of the entire case, to dismiss for failure of proof, and/or for a directed verdict of acquittal, should have been granted.

Scienter and possession, in the existing posture of the case, assume a vital importance.

The indictment charges (1) that the petitioner knowingly concealed and facilitated the transportation, knowing the same to have been illegally imported into the United States, and (2) knowingly bought and received

the heroin, knowing the same to have been illegally imported. The gravamen of each count, therefore, basically is knowledge of illegal importation. In its wisdom, the Congress did not make possession, per se, the crime, but did provide that possession is sufficient to authorize conviction, it being the intent of the Congress that possession was presumptive of knowledge of illegal importation. In other words, knowledge of illegal importation, can be inferred from knowing possession. Such an inference, properly drawn, is soundly based in law. It should be noted that the indictment contained no conspiracy count and this is significant because it cannot be said here that possession by a co-conspirator is sufficient basis to convict. Furthermore, knowledgeable concealing and facilitating and knowledgeable buying and receiving are also essential elements of the crime.

Admittedly, *scienter* is difficult to prove directly, and most generally it is proved by a valid inference validly drawn. It would follow, then, that actual and knowing possession is vital if the conviction is to be sustainable and that constructive possession is not sufficient. The rationale for this position is clear. Possession is the basis for the inference of knowledge of illegal importation and, if such possession is permitted to be a constructive possession, which is itself a possession by inference, then the knowledge of illegal importation would be based upon an inference which is, in turn, based upon an inference; and such a result is repugnant in law.

There is absent all proof that the petitioner ever saw the narcotics, either while they were in the possession of Esposito, while Esposito was placing them in the petitioner's car, or while they were physically in the petitioner's car. The Government may be heard to

argue that, while it may be true that petitioner did not have actual possession, the drugs were in petitioner's car while he was in the car and, therefore, there was a constructive possession proved. This argument will not stand scrutiny in view of the absolute requirement that there be actual possession. The difficulty is compounded by the further fact that petitioner was never alone in the car while the drugs were under the seat; for Chris Heyward was always in the same car at the same time as was petitioner. The packet was equally available to Heyward, and, if this be the fact, the so-called constructive possession is equally attributable to Heyward as it is to petitioner. Because of such co-extensive availability, the constructive possession must be attributed to Heyward and petitioner alike; and Heyward was not even charged. To carry the argument even further, who is there to assert, beyond a reasonable doubt, other than arbitrarily, that the possession was petitioner's and not Heyward's? The finger of guilt cannot be pointed at petitioner simultaneously absolving Heyward of all guilt. It would seem to be the law that, when contraband is equally available to more than one person, the standard of guilt necessary to convict becomes more stringent.

Where was the proof that the petitioner, in any case, had knowing possession? There is none and the very essence of constructive possession is a possession without knowledge. So the requirement of knowing possession is left unproved. It must be re-emphasized that possession is not the crime, but that knowledge of illegal importation is the crime.

The Government may be heard to ask: What about the large stack of bills turned over to Esposito by the petitioner in the pizzeria some seven hours before the question of possession arose? Does this not show the

Government may inquire, that this was payment for drugs which were placed in the petitioner's car for petitioner some seven hours later? Not at all. The Government has conceded, as it is the law, that the mere passing of money is not a crime. This money may well have been payment for a prior transaction, even a wholly legal and innocent transaction. Who is to say that the "dribs and drabs" of conversation overheard, at the time when John uttered the word "stuff" and "can be cut six ways" did not refer to an already consummated transaction? Where has the Government met that standard of proof beyond a reasonable doubt zealously demanded before a conviction can be had? There is no such proof, and the web woven by the Government would inspire nothing but scorn from the lowliest and most inept spider. Keeping airplanes flying with "bailing wire and spit," when performed by the gallant flyers of the legendary Lafayette Escadrille, did earn our eternal gratitude and never ending applause; but "bailing wire and spit" will not suffice to sustain a conviction inexorably followed by five long hard years behind prison walls.

The Law.

The Constitution mandates that an arrest must be lawful. *Staples v. United States*, 320 F. 2d 817.

The facts, as established by the Government, were insufficient to create the reasonable or probable cause required to permit an arrest without a warrant. Mere suspicion, no matter how strong, cannot substitute for reasonable or probable cause, as such is defined by this court. *Brinegar v. United States*, 388 U. S. 160; *Johnson v. United States*, 273 U. S. 28; *DiRe v. United States*, 331 U. S. 581; *Dumbra v. United States*, 268 U. S. 435; *Steele v. United States*, 267 U. S. 498; *Nathan-*

son v. United States, 290 U. S. 41. With respect to the money seen passed by petitioner earlier in the day, it has been held that the passing of money or slips or envelopes may be as consistent with innocence as with guilt. *People v. Haven*, 381 P. 2d 927.

The observations claimed to have been made, *in toto*, did not constitute a crime being committed in the presence of law enforcement officers. *Johnson v. United States*, 333 U. S. 10, 15.

It cannot be claimed validly that there was probable or reasonable cause to make an arrest.

Because the arrest was inherently bad, it would follow that any search claimed to have been made incidental to that unlawful arrest must fall. See *DiRe v. United States*, 331 U. S. 581, wherein this court said:

> "A search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

Assume, *arguendo*, that the arrest was good. Yet, it cannot be urged that the search was justified as being incidental to a lawful arrest. Under the provisions of the Fourth Amendment, and under the case law, the agents were required to first obtain a warrant before they conducted the search of the car. The Government may argue that, because the situs of the search was a moveable motor vehicle, an emergent situation existed and that, under *Carroll v. United States*, 267 U. S. 132, the arrest could be made and the search conducted without a warrant. This argument would be unavailing for two reasons. It is evident that the only reason why the arrest was made was to make a search, for a successful search was the only means available to justify the arrest. It is well settled that, assuming the arrest to be good, if the only purpose for making the arrest was a cover and excuse for making a search, a search

warrant is an absolute necessity. *United States v. Harris*, 321 F. 2d 739; *United States v. Evans*, 194 Fed. Supp. 90; *United States v. Robinson*, 325 F. 2d 391; *United States v. Smalls*, 223 Fed. Supp. 387.

There is a more compelling reason why the search must be deemed to have been invalid and unlawful because of the lack of a prior warrant. It was said in *United States v. Rabinowitz*, 339 U. S. 56, that there is but one justification for permitting searches incidental to lawful arrests with a search warrant:

(a) To protect the arresting officer from possible harm;

(b) To deprive a lawfully arrested person of the potential and means for escape;

(c) and to avoid destruction by the person arrested of the sought-after evidence.

By this standard, the warrantless search was not justified. The petitioner was forcibly removed from his car at the point of a gun, immediately manacled, and stowed in the back seat of the Government car. He never left that car until it arrived at the Narcotics Bureau, and he never saw his car again. Obviously, once removed from his car and manacled, he could do no harm to the arresting officers with means furnished by his car. With his hands manacled behind him and seated in the rear seat of the Government car, he lost all potential for escape and certainly all potential for escape in his own car. Likewise, in those awkward circumstances, he lost all means for destroying whatever evidence might be present in the car. The Government took the car and never thereafter relinquished it. Under such circumstances, there was no pressing need to make a search at the moment of the arrest. The Government

had the time to get fifty search warrants, let alone one, and they could have conducted the search at the convenience of the Government's agents. Indeed, *Carroll v. United States*, 267 U. S. 132, *supra*, states that:

> "In cases where the securing of a warrant is reasonably practicable, it must be used * * *."

There are other elements in the case at bar which make the obtaining of a search warrant even more of an imperative. When petitioner was taken from his own car and placed in the back seat of the Government's car, he was not present at the time and place of the search, inasmuch as he could not see what was going on, and, to all intents and purposes, he could have been fifty miles away as effectively as ten feet away under the circumstances. Despite petitioner's physical proximity to the scene of the search, it cannot be said that the search was made in his presence. Thus, *Preston v. United States*, 376 U. S. 364, would control. *Preston* totally circumscribed *Carroll* and explicated the ruling made in *Rabinowitz*. There, Mr. Justice Hugo Black asserted:

> "Our cases make it clear that the searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible.
>
> * * *
>
> "It is argued that the search and seizure was justified as incidental to a lawful arrest. Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime * * *. This right to search and seize without a search warrant extends to things under the accused's immediate control."

At the time the search of the car was made, it was by no definition under the control of the petitioner, immediate or not. And the test is only, repeat only, whether or not the accused has control or, having lost it, he can gain control of the motor vehicle to be searched. By that test, no amount of rationalizing can obliterate the absolute requirement for a search warrant. No amount of tortured logic can it be argued that petitioner ever had the possibility to recapture his automobile.

The search was bad because the arrest was bad. The search was bad because it was based on an arrest that was made only to provide an excuse to search. The search was bad because, without a warrant, it violated both the spirit and the letter of the rules laid down by this court in the case of movable vehicles.

It has been held in the Second Circuit that "constructive possession may be established by a showing of dominance and control over the narcotics * * *." *United States v. Rosano*, 327 F. 2d 561. How can there be a showing of dominance and control where it was not shown that the petitioner even knew that the narcotics were in his car? No heroin was actually ever seen by the agents until the fortuitous find was made. Nor was the slightest proof offered, barring the use of left-field logic, that the petitioner knew or even should have known that Esposito was planting narcotics in the car. Assuming the truth of what O'Brien said, he was in a better position to see what Esposito was doing than the petitioner was, since the petitioner was on the opposite side of the car from which Esposito was practicing his slight-of-hand, and O'Brien did not actually see what Esposito was doing. If it was not shown that, forgetting the strictures imposed by reasonable doubt, that petitioner knew the narcotics were in the car, how

can he be charged with knowing that it was illegally imported? Mere proximity, without knowledge, even inferentially, cannot be equated with possession, actual or constructive. *Murray v. United States* (9th Cir. 1969), 403 F. 2d 694. *United States v. Hernandez* (2d Cir. 1960), 290 F. 2d 86. It should be noted that the Government insists that petitioner was under constant and uninterrupted surveillance, and that, during such surveillance, no act was testified to which might demonstrate that the petitioner was aware of the presence of contraband in his car. If it be argued that petitioner had control of the heroin because he was in control of the vehicle, then such control, inexitably, was unwitting in nature, and it was not of the character intended by the statutes and the case law.

Suppose, *arguendo*, that the tenuous thread of "constructive possession" were to be upheld. Possession of the drug was not the crime. *Rodella v. United States* (2d Cir. 1960), 286 F. 2d 306. Could the requisite scienter, which is the crime, and then only if we draw the artificial inference on the question of importation, possibly be held to exist in the present circumstances? Only if the law would approve a tenuous inference built upon an even more tenuous inference.

From a different point of view, possession, whether constructive or actual, must be a conscious possession. No proof was offered that the petitioner knew that there were narcotics in the car. See: *Cellini v. United States* (9th Cir. 1960), 276 F. 2d 941.

The Government was required to establish each element of the crime charged beyond a reasonable doubt, including petitioner's knowledge of illegal importation. *United States v. Peeples* (2d Cir. 1967), 377 F. 2d 205. The proof must be clear, unambiguous and convincing. Such a finding would be impossible in the case at bar.

Much has been shown to justify certiorari here. The rule laid down in *Preston v. United States*, 376 U. S. 364, should be further and more definitively clarified, since it is being totally ignored by the Second Circuit. Similarly, in its supervisory capacity over the circuit courts, this court should once again redefine the standards for determining unlawful arrests and illegal search and seizure, for, lest this be done, the Second Circuit shall continue on its way, determined to grasp at any straw to affirm every conviction involving the dread word heroin, regardless of the propriety of such affirmances and regardless, incidentally, of the outside possibility that a person charged with a heroin crime might just be innocent of that crime.

The era of repression is in full swing, and, unless checked, the yeoman efforts of this court, exerted in defiance of an indescribable surge of know-nothingism, will have been in vain, and the Founding Fathers shall weep.

Respectfully submitted.

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Appendix A.

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of June one thousand nine hundred and seventy.

Present:

Hon. J. Edward Lumbard,
Chief Judge.
Hon. J. Joseph Smith,
Hon. Irving R. Kaufman,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD L. SCRIVEN, also known as Harold Lee Scrivens,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Appendix B.

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1969

HAROLD L. SCRIVEN,

Petitioner,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 1st, 1970.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 18th day of June, 1970.

OPPOSITION BRIEF

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No. 79-

In the Supreme Court of the United States

OCTOBER TERM, 1979

HAROLD L. SCRIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILLI WILSON,
Assistant Attorney General,

EDWARD FENIG,
Attorney,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 438

HAROLD L. SCRIVEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals did not render an opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on June 2, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of

certiorari to August 1, 1970, and on July 23, 1970 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest of petitioner and the contemporaneous search of the automobile he was driving.

2. Whether there was sufficient evidence that petitioner knowingly possessed heroin at the time of his arrest.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of two counts of receipt, concealment and transportation of approximately 111 grams of heroin, in violation of 21 U.S.C. 174. He was sentenced to concurrent terms of five years' imprisonment on each count.

The evidence showed that Federal Bureau of Narcotics agents had two known narcotics dealers named Esposito under surveillance (9 R. 48, 53).[1] Petitioner and a friend, Chris Heyward, had previously given information to the agents as to the Espositos' drug activity (10 R. 5, 8). As a result of their surveillance, the agents saw petitioner drive to a restaurant

[1] "R." refers to the four volume trial transcript, separately paginated for each trial day. The first volume, in accord with the court of appeals assigned numbers, is designated "9 R." This transcript is on file with the Clerk of this Court.

where he met with John Esposito (9 R. 13-14). Agent O'Brien, posing as a patron, overheard portions of their conversation including references to "stuff," a gas station and "later that night," as well as an instruction to "cut it six times" (9 R. 16, 18, 20, 22, 10 R. 16). Agent O'Brien also observed petitioner give John Esposito a large quantity of money (9 R. 21).

After the meeting, one of O'Brien's assistant agents received information from a reliable informant about a Sunoco gasoline station in the same vicinity. Agents then commenced surveillance at that location (10 R. 70-71, 75). Petitioner, accompanied by Heyward, arrived shortly and stopped at an adjacent ice cream store (9 R. 27, 10 R. 70-71). There, he met John Esposito (9 R. 27). Petitioner entered his car on the passenger side while John Esposito entered on the driver's side (9 R. 28-29, 10 R. 72), and pulled something from his pocket (9 R. 38, 10 R. 23). They remained in the vehicle only a few seconds (9 R. 29, 10 R. 73), after which they both alighted. Petitioner then drove off with Heyward.

Petitioner's vehicle was stopped, both men were arrested, and the car was searched. A package containing heroin (9 R. 40, 42) was found under the front seat, on the driver's side (10 R. 23, 31).

Petitioner was advised of his rights against self-incrimination and to an attorney near the scene shortly after his arrest. He made no statement then, although he later responded to questions at the Bureau of Narcotics field office. There, he indicated he had obtained the "stuff" from "Johnny" and that it was worth approximately $4,000 (9 R. 39-40).

ARGUMENT

1. There was probable cause to believe that petitioner had obtained narcotics which Esposito had placed in the car shortly before petitioner was arrested.[2] Under these circumstances, the search of the car was authorized. See *Carroll* v. *United States*, 267 U.S. 132; *Chambers* v. *Maroney*, No. 830, O.T. 1969, decided June 22, 1970.

2. There is sufficient evidence of petitioner's knowing possession of heroin. Possession was not equally attributable to his passenger, Heyward[3] (Pet. 13).

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[2] Petitioner's recital of the testimony in regard to probable cause is misleading. He quotes Agent O'Brien as saying that he did not know if petitioner had entered his own vehicle while John Esposito was in the driver's seat, and that when he arrested petitioner he did not know if petitioner had received narcotics from Esposito (Pet. 6, 7). The quotations are correct but should be read in context. O'Brien was not sure as to petitioner's entry into the vehicle but he could see that while John Esposito was seated in the driver's seat, petitioner opened the door on the passenger side because the car light then went on (10 R. 24, 25). Further, while O'Brien was not sure, another agent, Gallagher, was certain petitioner had entered the vehicle at that time and that petitioner and John Esposito had "got right out, almost immediately" (10 R. 72-73). O'Brien did not "know" that petitioner had received narcotics from Esposito, but he always testified that he had reason to believe that there were narcotics in the car before the arrest was made (9 R. 39, 57-59).

[3] The evidence showed that Heyward was drunk when the arrests were made (11 R. 57), and that the only unusual item found on him when he was searched was a Bowie knife (9 R. 73, 10 R. 59-60, 74). Petitioner testified that Heyward had later offered to take the blame (10 R. 164). According to the defense counsel, Heyward made a statement to counsel (Defense Exhibit A) that at the time of his arrest with peti-

Petitioner made the payment to John Esposito. His pretrial statement, acknowledged, moreover, that he bought the "stuff."

CONCLUSION

For the foregoing reasons, it is respectfuly submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

EDWARD FENIG,
Attorney.

AUGUST 1970.

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tioner, he (Heyward) had heroin in his pocket (11 R. 12). At trial, Heyward was called as a defense witness but refused to testify (10 R. 122).

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